

No. 11749.

IN THE

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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J. A. JOSE, OLGA JOSE, CORDA LANCASTER, WILLIAM LANCASTER, ELLA JACKMAN, JOHN I. JACKMAN, GEORGE T. RENAKER, JOHN S. PATTEN, HARRIS H. HAMMOND, A. L. BERGERE, J. C. BERGERE, WILLARD WALLACE, EDNA M. WALLACE, JAMES P. DELANEY, MARY J. DELANEY and IRVIN S. BARTHEL,

*Appellants,*

*vs.*

HATTIE M. HOUCK, as Administratrix of the Estate of Stanley B. Houck, Deceased, RUBY E. EDLING, WILNA M. SHEPARD, HATTIE M. HOUCK, RUTH M. HEBBERD, MINNIE N. McKENZIE, HOWARD H. McKENZIE, VERONICA K. GHOSTLEY and H. W. LEWIS,

*Appellees.*

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Reply Brief of Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel.

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Reply Brief of Appellants Harris H. Hammond, A. L. Bergere, J. C. Bergere, Willard Wallace, Edna M. Wallace, James P. Delaney, Mary J. Delaney and Irvin S. Barthel.

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## INTRODUCTORY STATEMENT.

Appellants submit herewith their Reply to the respective Briefs of the Appellees and the Appellants J. A. Jose, *et al.*

## THE BRIEF OF APPELLEES.

In their Brief Appellees make several contentions relating to (1) Discovery, (2) Appellees' Notices of Location, (3) Appellees' performance of labor, (4) Appellants' Notices of Location, (5) Recordation of Notices of Location by Appellants, and (6) Intervening Rights.

Each of these points is categorically hereinafter discussed.

I.

Discovery.

- (1) APPELLEES' CONTENTION THAT NO ISSUE OF DISCOVERY WAS TENDERED AT THE TRIAL OF THE CAUSE (Appellees' Brief pp. 3, 14, 16 and 18).

This argument is utterly without merit. By their Complaint herein [R. p. 4], Appellees averred ownership and the right to the possession of the Placer Mining Claims herein involved. This allegation was expressly denied by the Answer of Appellants, who, on the contrary, alleged ownership and the right to possession in themselves (Appellants' Answer and Counter-Claim [R. pp. 20, 23]). Appellees in their Answer to the allegations of the Counter-Claim, specifically denied these averments of Appellants.

By these pleadings there was imposed upon Appellees the burden of proving every element necessary to sustain their title. *Gwillim v. Donnellan*, 115 U. S. 45, 50 (5 S. Ct. 1110); *Jackson v. Roby*, 109 U. S. 440 (3 S. Ct. 301); *Bay State Silver Mining Co. v. Brown*, 21 Fed. 167 (C. C. Nev.); 40 C. J.—Mines and Minerals—Section 500. The allegations of Appellees' Complaint being denied, it was thus incumbent upon them to prove discovery of the mineral herein claimed. *Erhardt v. Boaro*, 113 U. S. 527, 535-537 (5 S. Ct. 560); *Chrisman v. Miller*, 197 U. S. 313, 320, 323 (25 S. Ct. 468); *New England etc. Oil Co. v. Congdon*, 152 Cal. 211 (92 Pac. 180); *Garibaldi v. Grillo*, 17 Cal. App. 540, 542 (120 Pac. 425); *Smith v. Newell*, 86 Fed. 56, 59, 60 (C. C. Utah).

These cases very definitely establish that failure to prove discovery is fatal in an action to quiet title to or for the possession of a mining claim; that neither the posting of notices of location, the proof of a record of a location, nor marking of boundaries on the ground dispenses with proof of discovery; and that not even a stipulation between rival mining claimants that one or the other of the parties has made a discovery is sufficient to satisfy the burden of proof.

- (2) APPELLEES' CONTENTION THAT APPELLANTS ARE "CONFUSED" AS TO THE CORRECT DEFINITION OF DISCOVERY AND THE DISTINCTION BETWEEN DISCOVERY OF MINERALS BEFORE LOCATION AND DISCOVERY WORK AFTER LOCATION (Appellees' Brief p. 10).

We do not deem it necessary to dwell at length upon the bald assertion of Appellees that Appellants are confused as to the meaning of discovery. We rely upon the statutory enactments and the adjudications referred to in our Opening Brief, from pages 19 to 23, as defining the meaning of the word discovery in the law of mining. From these citations it is established as a fundamental rule that there must be discovery of mineral before lands may be appropriated by a claimant, and that discovery is the acquisition of knowledge that a placer claim contains minerals that are reasonably valuable for mining to an extent justifying a reasonably prudent man in expending time and money to develop the claim with the reasonable expectation of finding minerals in paying quantities.

Unless such a discovery is made, a claimant has made no valid location and acquires no title. The contention by Appellees, at pages 9 and 11 of their Brief, that this rule is modified by *Chrisman v. Miller*, 197 U. S. 313 (25 S. Ct. 468), and *Steele v. Tanana Mines Company*, 148 Fed. 678 (C. C. A. 9), is patently incorrect. These cases were cited by Appellants for, and they sustain the proposition that, discovery of mineral in placer mining claims is an absolute condition precedent to the establishment of the claimant's title. See *Chrisman v. Miller*, 197 U. S. 313, 323; *Steele v. Tanana Mines Company*, 148 Fed. 678, 679. The fact that the rule respecting the sufficiency of a discovery is more liberal between rival mineral claimants than between a mineral claimant and an agricultural entryman is irrelevant to the question, for regardless of the

degree of proof of discovery, the fundamental fact remains, that whether the contest be between rival mineral claimants or mineral claimants and others, discovery must be established.

Appellees are likewise in error when they assert, as appears on page 10 of their Brief, that before there can be a location notice there must be a discovery of minerals. This is not the law. The following cases expressly hold that discovery may follow the posting of a location notice: *Cole v. Ralph*, 252 U. S. 286, 296 (40 S. Ct. 321); *Union Oil Company v. Smith*, 249 U. S. 337, 347 (39 S. Ct. 308); *Mining Creede etc. Company v. Tunnel Company*, 196 U. S. 337, 348 (25 S. Ct. 266); *Weed v. Snook*, 144 Cal. 439, 443 (77 Pac. 1023).

We turn next to the argument by Appellees that Appellants have failed to distinguish between discovery of mineral and discovery work after location required by State Statute (Appellees' Brief p. 10). Appellees' remarks in support thereof again demonstrate basic error. Appellees assert that the cases of *U. S. v. McCutcheon*, 238 Fed. 575 (D. C. Cal.), and *Hall v. McKinnon*, 193 Fed. 572 (C. C. A. 9), cited by Appellants at pages 10 and 12 of their Brief, illustrate the distinction. Neither case is open to the erroneous challenge made by Appellees. The *McCutcheon* case had nothing whatsoever to do with the performance of discovery work, required by State Statute. There, the Government asserted title to certain California oil lands upon which defendant had entered, erected monuments and posted and filed notices of location at a time when the lands were open to entry, but without discovery prior to the withdrawal of the land from the

public domain. The very basis of allowing recovery by the Government was the failure of the claimants to prove discovery, as defined in *Chrisman v. Miller*, 197 U. S. 313.

Nor does the *McKinnon* case involve discovery work as required by State Statute. In that case the Court ruled that discovery of gold following the staking of a placer mining claim was sufficient to establish priority against a subsequent locator and discoverer.

(3) APPELLEES' CONTENTION THAT THERE WAS AMPLE EVIDENCE TO SHOW DISCOVERY OF MINERALS BY APPELLEES BEFORE THE LOCATIONS WERE FILED. (Appellees' Brief p. 18.)

At page 4 of their Brief, Appellees refer to the entry on the lands in 1942 by their Mr. Lewis. The record discloses that he did no digging, but merely picked up some unidentified number of samples from the side of a cliff which he was told contained the clay [R. p. 143]. No other evidence of discovery of the mineral appears in the record. The utter insufficiency of proof of discovery through the samples of Mr. Lewis is made clear when tested in the light of the applicable law.

There was no showing where on the property the samples were taken. There is no proof that the samples gave any evidence, reasonable or otherwise, that the lands were valuable for placer mining to an extent justifying a prudent man in expending his time and money in developing the claims with the reasonable expectation of finding mineral in paying quantities. Nothing was tendered by Appellees concerning the quality or extent of the mineral or any

other fact from which the Court could have determined whether a prudent person would have been justified in going forward with exploitation on the basis of Mr. Lewis' samples. The foregoing elements are fundamental in the proof of discovery (see Appellants' Brief p. 21 and cases there cited). The best that can be said for Lewis' samples is that they did not arise above the dignity of mere surface indications which were undefined either as to quality, scope or extent and were therefore, totally insufficient to show discovery. *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 11 Fed. 666, 675 (C. C. Calif.); *Garibaldi v. Grillo*, 17 Cal. App. 540, 543-544 (120 Pac. 425).

The attempt by Appellees to bolster their claim of discovery by referring to the stipulation of the parties (Appellees' Brief p. 15) that the value of the mineral deposits was in excess of the jurisdiction of the Court, merely emphasizes the absence of their proof. This stipulation [R. p. 63] had nothing whatsoever to do with any of the activities of any of the parties nor with any issue in the case other than that of the jurisdictional amount of the District Court.

Similarly, the contention of Appellees at pages 3 and 16 of their Brief, that their Application to the Land Department for the reopening of the lands presents "strong evidence of such discovery" is without merit. There is nothing in this Application or any act of the Land Department which indicates a discovery by Appellees, and even if there was, the same would be wholly incompetent as self-serving and hearsay declarations.

II.

Posting of Notices of Location by Appellees.

- (1) APPELLEES' CONTENTION THAT THEIR POSTINGS OF THE NOTICES OF LOCATION COMPLIED WITH SECTION 2303(a) OF THE PUBLIC RESOURCES CODE OF CALIFORNIA.

At page 25 of Appellants' Opening Brief it is pointed out that the only posts placed upon the lands by Appellees were those which were placed on September 6th, 1945, at a time when the land was not open to entry. In attempting to avoid the effect of the principle of law that any act or proceeding taken to initiate a mining claim on withdrawn land is void, Appellees claim that they had a right to adopt on September 7th, when the lands were open, their postings of September 6th.

In reply, we urge that implicit in the right to adopt former stakes or monuments is the condition that such stakes or monuments must themselves have been validly placed upon the land. A contrary conclusion would permit the accomplishment by indirection of that which cannot be done directly, to wit: the initiation of any right upon lands withdrawn from entry.

Furthermore, the evidence does not support Appellees' argument that they adopted the postings of September 6th. None of the Appellees testified concerning their purpose in posting the land on that date or their intent in returning on the following day and adding an additional Notice in each bottle. There is no evidence that the Notices placed in the bottles on September 6th were removed or that they were substituted by the Notices of September 7th. On the contrary, it appears that, with the exception of two Notices of Location dated September 7th, all of Appellees' Notices of Located dated September 6th and September 7th were recorded at the same time on Decem-

ber 4th, 1945, in the Office of the County Recorder of Imperial County. The excepted two were recorded on December 5th [R. pp. 101, 106]. All of these duplicates contain the same references to the statement of discovery work performed. In view of the equivocal nature of these acts by Appellees, we urge that the argument that they elected to adopt the postings of September 6th is not sustained. For if that had been their purpose, they would not have relied upon or recorded the Notices of September 6th.

### III.

#### Posting of Notices of Location by Appellants.

##### (1) APPELLEES' CONTENTION THAT APPELLANTS USED DEFECTIVE COLORADO FORMS FOR THEIR NOTICES OF LOCATION.

On pages 6, 7, 29 and 30 of their Brief, Appellees urge that the Notices of Location posted by Appellants did not contain a statement of the markings of the boundaries and property and that, therefore, there was no compliance with Section 2303 of the California Public Resources Code. This argument is groundless. Section 2303(b) of the California Public Resources Code provides that claims may be taken by legal subdivisions upon lands over which United States Survey has been extended, that in such case the boundaries need not be staked or monumented, and that the description by legal subdivision is the equivalent to marking.

In this cause it sufficiently appears that the United States Survey had been extended over the lands in the location claimed by Appellants [R. p. 64]; in all of Appellants' Notices of Location the respective claims were taken by legal subdivision; therefore, no statement of markings was required. This is the express ruling of the Court in

*Pidgeon v. Lamb*, 133 Cal. App. 342, 346 (24 P. (2d) 206); *Bender v. Lamb*, 133 Cal. App. 348, 349 (24 P. (2d) 208), Cert. Den. 291 U. S. 662 (54 S. Ct. 438).

(2) APPELLEES' CONTENTION THAT APPELLANTS DID NOT TAKE STEPS TO PREVENT THE DESTRUCTION OR OBLITERATION OF APPELLANTS' NOTICES OF LOCATION. (Appellees' Brief pp. 6-7.)

The implication in this argument that Appellants' Notices of Location were destroyed or obliterated is incorrect as a matter of fact and the further implication that Appellants were under a duty to preserve the Notices is unsound as a matter of law. It is undisputed that the Notices of Location by Appellants remained posted upon the land and were legible as to the entire contents thereof as late as November, 1945 [R. pp. 343, 344], when Appellants performed their discovery work and recorded copies of these Notices. The fact that Exhibit "Q," one of Appellants' original Notices of Location, appeared to be weatherbeaten and portions thereof obliterated by the elements approximately sixteen months after the original posting [R. p. 253], does not affect this case, for it is settled that Notices of Location are not intended to be permanently affixed to the lands, but are for the temporary protection of a locator while the other acts requisite to location are being performed. *Donahue v. Meister*, 88 Cal. 121, 131 (25 Pac. 1096).

Upon the recordation of Appellants' Notices of Location in November, 1946, constructive notice of possession, boundaries and of their claim was furnished and bound all others. *Bender v. Lamb*, 133 Cal. App. 348, 350 (24 P. (2d) 208), Cert. Den. 291 U. S. 662 (54 S. Ct. 438).

Furthermore, it is established that neither Federal nor State Statutes require a locator to take steps or measures to prevent the destruction or obliteration of posted Notices

of Location. The occurrence of such obliteration or destruction without the fault of the locator cannot operate to divest him of his rights. *Walsh v. Erwin*, 115 Fed. 531, 537 (C. C. Calif.); *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 11 Fed. 666, 677 (C. C. Calif.); *Tonopah etc. Co. v. Tonopah Mining Co.*, 125 Fed. 389, 392 (C. C. Nev.); *Treasury Tunnel etc. Co. v. Boss*, 32 Colo. 27, 31 (74 Pac. 888); *Bender v. Lamb*, 133 Cal. App. 348 (24 P. (2d) 208), Cert. Den. 291 U. S. 662 (54 S. Ct. 438).

- (3) APPELLEES' CONTENTION THAT THERE WAS NO EVIDENCE THAT THE APPELLANTS' NOTICE OF LOCATION, EXHIBIT "Q", WAS EVER SIGNED. (Appellees' Brief p. 7.)

This argument is without merit. A mere inspection of the Exhibit discloses that the obliteration of not only the signatures but of other typewritten and printed portions thereof is due to obvious weathering. The evidence is uncontradicted that this Notice of Location, as well as all others which were posted by Appellants upon the lands, were signed by them [R. pp. 251-252, 256-258, 260, 266, 275]. The signatures were on all of these Notices as late as November, 1945, and were clearly legible [R. p. 344].

- (4) THE CONTENTION OF APPELLEES THAT THE ORIGINAL NOTICES OF LOCATION WERE ADMITTED BY APPELLANTS TO BE INVALID. (Appellees' Brief pp. 7, 30.)

An examination of the argument advanced by Appellees on this point shows that it is utterly without merit. In support of the argument Appellees urge that counsel for Appellants stated that the purpose of introducing the original Location Notices was ". . . not . . . for the purpose of showing that we complied with any statute,

other than that we have in evidence a duplicate of that which was posted on the property of which we have the oral testimony of the witnesses" (Appellees' Brief p. 30). Mr. Painter, Appellants' counsel, was not offering or referring to the *original* Notices at all, but duplicate copies thereof which had been recorded on September 7th [R. p. 349]. It is obvious that his statement that the offering of the duplicates was ". . . not . . . to show compliance with any statute . . ." is not an admission that the document was invalid. The remark made by Mr. Painter was in response to an objection of the Appellees to the admission of the duplicate copies on the assertion that they were prematurely recorded. This ground of objection was not well taken, since a premature recordation does not vitiate a Notice of Location, *Thompson v. Spray*, 72 Cal. 528, 533 (14 Pac. 182). Nevertheless, the point was not argued and Mr. Painter did not introduce the documents for the purpose of showing compliance with the recording Statute of California, but as cumulative evidence, documentary in nature, to have before the Court and in evidence, duplicates of what had been posted upon the land.

The further argument made at page 30 of Appellees' Brief that the *original* Location Notices were never re-recorded nor introduced at the trial as a proper Notice of Location, and with the implication that recordation and re-recordation of the originals and their introduction as evidence were necessary, is obviously erroneous. The original Notices were posted upon the ground. Such Notices are neither required to be, or are ever, recorded or re-recorded. True copies thereof, and not the originals, are what the law requires to be recorded. California Public Resources Code, Section 2313. While it is true that the original Notices were not introduced in evidence, nevertheless the true copies thereof, hereinabove referred to, were introduced in evidence as proof of Appellants' Notices of Location and the propriety thereof.

#### IV. Appellant's Amended Notices of Location.

- (1) THE CONTENTION OF APPELLEES THAT APPELLANTS' AMENDED NOTICES OF LOCATION, EXHIBIT KK, FAILED TO COMPLY WITH THE PUBLIC RESOURCES CODE OF CALIFORNIA.

At page 23 of their Brief, Appellees urge

(a) That the original Notices of Location were on Colorado forms which did not contain a statement of markings and performance of discovery work and (b) that the Amended Notices which were recorded did contain such a statement and hence could not be true copies of the posted original Notices of Location. But under Section 2303 of the California Public Resources Code, a statement of the markings is not required, either on the posted or recorded copies of the Notices of Location, when a claim is taken, as here, by legal subdivisions upon lands over which a United States Survey has been extended. Next, there is no requirement for a statement of the performance of discovery work on the posted Notices of Location. It is only upon the recorded copy of the Notices of Location that the locator is required to set forth his statement of discovery work performed within the ninety days after his original posting. Section 2313, California Public Resources Code.

Appellees' final contention on the point of compliance by Appellants with the recording provisions of the California Public Resources Code comes down to this—that the Amended Notices of Location are not substantially true copies of the original posted Notices of Location

because the Amended Notices contain a statement not found in the original Notices, to wit:

“The markings of the boundaries of the aforesaid claim have been dispensed with since the claim has been located and described by legal subdivisions conforming to the United States General Land Office Survey of 1912.”

This quoted statement in the Amended Notices is merely an expression of what the law implies in the original Notices of Location on lands over which the United States Survey has been extended. As heretofore indicated, in each of the Notices of Location posted upon the lands Appellants' claims were taken by specific legal description. Technically, therefore, it was unnecessary to add the clause in the Amended Notices entitled “Statement of Markings of Boundaries.” But it is well settled that surplusage of this nature harms no one and is never construed as vitiating a Notice of Location which is otherwise proper. *Duryea v. Boucher*, 67 Cal. 141, 143 (7 Pac. 421); *Mitchell v. Hutchinson*, 142 Cal. 404, 411 (76 Pac. 55).

Concluding on this point, it is pertinent to indicate here that Appellees knew of all of the acts and proceedings taken by Appellants, from the very inception of the claims. Appellees were aware of Appellants' presence upon the lands on September 7th and their activities in connection with the posting of the Notices of Location [R. pp. 212-213; 279, 281]. On September 7, 1945, Appellants and Appellees were present at the same exact time upon the Southeast quarter of Section Twenty-one [R. pp. 188, 189, 270]. On the Northeast Quarter of Section Twenty-

eight Appellants posted their Notices of Location three minutes before Appellees inserted their duplicate Notice of Location in the glass jar [R. pp. 189, 272]. On the Northwest Quarter of Section Twenty Appellants were prior by almost two hours [R. pp. 196, 197, 276]. On the Southwest Quarter of Section Twenty Appellants were prior by approximately two hours [R. pp. 194, 274-275]. On the Northwest Quarter of Section Twenty-nine Appellants were prior by two hours [R. pp. 195, 196, 275]. On the Northeast Quarter of Section Twenty-nine Appellants were prior by almost three-quarters of an hour [R. pp. 132, 274]. On the Northwest Quarter of Section Twenty-eight Appellants were prior by almost an hour [R. pp. 131, 273].

It is also undisputed that Appellants' posted Notices of Location were upon the lands and visible and legible as late as November or December, 1945. In addition, Appellants' extensive excavation work was apparent to anyone who looked. These conditions existed at the time when Appellees entered the lands to perform their mining development work in the latter part of November, 1945. Appellees thus had actual knowledge at all times of the claims of Appellants, from September 7th, 1945. Since the purpose of posting and recording of a Notice of Location is to give notice of the claim, the rule is settled that acquisition of actual notice and knowledge of such claim precludes attack by a subsequent locator. *Talmadge v. St. John*, 129 Cal. 430, 436, 437 (62 Pac. 79). Appellees therefore have no basis for complaint.

## V. Performance of Labor.

### (1) APPELLEES' CONTENTION THAT THEY COMPLIED WITH THE PROVISIONS OF SECTION 2305 OF THE CALIFORNIA PUBLIC RESOURCES CODE.

This contention is not sustained by the record, although Appellees claim that they paid "a little over \$2600.00" for mining development work (Appellees' Brief, p. 6). This appears to be based upon the bald assertion of Mr. Lewis that he spent \$160.00 per claim (See Appellees' Brief, p. 21). A mere reference to the time book, Exhibit 45, discloses this error. As pointed out in our Opening Brief at page 27, the time book shows labor expenditures of \$2085.90. This book was made under the direction and supervision of Lewis and was stated by him to contain the payroll "for the digging of the holes" [R. pp. 150, 156]. This was the total amount paid to the laborers. The bankers did not corroborate the expenditure of \$2500.00 for labor, as claimed by Appellees on page 21 of their Brief. The bankers merely testified that they cashed a check in the amount of \$2500.00 for Mr. Lewis and gave him the money. They did not know how much Mr. Lewis paid the laborers nor did they know the amount of their earnings [R. pp. 178-179, 180-181].

Nor did Mr. Lewis testify that the amount that he did spend upon the development of the property was the reasonable value thereof, as claimed on page 22 of Appellees' Brief. He merely testified to the fact of the expenditure and not to the reasonable value.

Clearly, the Appellees failed to meet the statutory requirements of Section 2305 of the Public Resources Code of California. For they not only failed to prove the statutory minimum for the entire acreage, but they also failed to prove the apportionment of whatever they did spend among the various sixteen claims.

## VI. Intervening Rights.

At pages 30 to 31 of their Brief, Appellees claim that they are entitled to the status of persons having intervening rights. This contention is wholly without merit for, as we have shown on pages 33 to 37 of our Opening Brief, Appellees were at most speculative explorers whose rights were never vested. Appellants' being first discoverers, and having posted their Notices of Location and completed their mining development work, of which Appellees had knowledge, there is no basis for any claim whatsoever upon the part of Appellees that they had rights which intervened. By the perfection of Appellants' locations, the land was withdrawn and not open to entry at all. *Miller v. Chrisman*, 140 Cal. 440, 446, *et seq.* (74 Pac. 1083); *Hosmer v. Wallace*, 97 U. S. 575, 579, *et seq.* (24 L. Ed. 1130); *Iron Silver Co. v. Mike and Starr Co.*, 143 U. S. 394, 402, 403 (12 S. Ct. 543); *Erhardt v. Boaro*, 113 U. S. 527, 535, 536 (5 S. Ct. 560); *Belk v. Meagher*, 104 U. S. 279, 287 (26 L. Ed. 735); *Cole v. Ralph*, 252 U. S. 286, 294, *et seq.* (40 S. Ct. 321); *Johanson v. White*, 160 Fed. 901 (C. C. A. 9).

## THE JOSE BRIEF

The Appellants Jose, *et al.* do not challenge the validity of Appellants' discovery of mineral or the sufficiency of the Notices of Location posted upon the claims or the sufficiency of the copies thereof which were recorded in the Office of the County Recorder of Imperial County. The principal point raised by the Jose group is that Appellants did not comply with Sections 2304 and 2305 of the Public Resources Code of California (Jose Opening Brief, pp. 12-13).

The basis of the Jose argument is the claim that Section 2304 requires a shaft, tunnel or excavation ten feet in depth, which, it is said by them, is included in the provisions of Section 2305 of the California Public Resources Code. An examination of the cited Code sections discloses that this argument is untenable. Section 2304 is divided into two subsections, 2304(a) and 2304(b). It is true that under Section 2304(a) of the Public Resources Code the locator is required to sink a ten foot shaft or open cut upon the claim. It is specifically provided, however, in Section 2304(b) that "*In lieu of the discovery work required by paragraph (a) of this section, the locator of a placer mining claim may, within ninety days of the date of location, excavate an open cut upon the claim, removing from the cut not less than seven cubic yards of material.*" (Italics ours.) Section 2305 is directed to placer claims in excess of twenty acres and provides for the performance of \$1.00 worth of work for each acre included in the claims, and states "Nothing in this section shall be construed as a modification of the requirements of section 2304 of this code."

and expose the deposit. The Legislature eliminated these former requirements and left it to the locators' choice, either to make an excavation ten feet in depth or remove seven cubic yards of material. Section 2305 does not impose any requirement as to excavations, tunnels or shafts. That section merely requires mining development work in the value of \$1.00 per acre upon claims in excess of twenty acres, with the proviso that the section should not be construed as modifying the requirements of Section 2304.

We therefore urge that Appellants were entitled to select between the two modes of excavation work provided for in Section 2304 of the California Public Resources Code. They were entitled to, and did, follow the requirements of Section 2304(b) and in so doing perfected their locations.

### Conclusion.

We believe we have fully demonstrated, in this and our Opening Brief, that Appellees have failed to sustain their cause. We urge that Appellants proved every element which the law requires for the establishment of the right and title to a mining claim. It is submitted that the judgment of the Trial Court did not do justice between the parties, that reversible error was committed in awarding judgment in favor of Appellees, that such judgment should be set aside and the Trial Court directed to enter a judgment in favor of the Appellants, quieting their title to the claims herein referred to.

Respectfully submitted,

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